

Internal Revenue Service
memorandum

CC:TL:Br3
GEBowden

date: JUN 14 1990

to: District Counsel, Omaha MW:OMA

TL-N-7614-90
CC:TL:Br3 Bowden/Coe
I.R.C. §§ 1311-1314
Mitigation Provisions and
Equitable Recoupment

from: Chief, Branch 3, Tax Litigation Division CC:TL:Br3

subject: [REDACTED] Dkt. No. [REDACTED]

Your memorandum of June 6, 1990 requested Tax Litigation Advice with respect to the above referenced case. In our view, your memorandum fully addresses all the relevant factors, and we concur with the conclusions you have reached.

ISSUES

1. Whether the mitigation statutes will allow petitioner to reopen closed years to take amortization deductions to which it would otherwise be entitled under the rationale of Colonial American Life Insurance Company v. Commissioner, 491 U.S. ___, 109 S.Ct. 2408 (1989).

2. Whether equitable recoupment would allow the petitioner to set off the amortization deductions from the closed years against the deficiencies in the instant case, or allow the reopening of the closed years.

CONCLUSIONS

1. The mitigation provisions will allow the petitioner to reopen the closed years.

2. Equitable recoupment will not be available to petitioner.

FACTS

At issue in the present case are deductions for reinsurance ceding commissions taken by petitioner in [REDACTED], [REDACTED] and [REDACTED]. It is the Service position that these commissions are amortizable rather than deductible. We lost this issue in the Tax Court and the Court of Appeals, but the case was remanded by the Supreme Court for reconsideration in light of the Colonial American opinion. In that opinion, the Supreme Court concluded that such commissions were amortizable over a sixty month period.

Because petitioner had currently deducted the full value of the commissions in [REDACTED], [REDACTED] and [REDACTED], amortization of the

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commissions produces deficiencies in those years. However, petitioner is entitled to deductions for [REDACTED], [REDACTED], [REDACTED], and [REDACTED] for the amortization of the commissions. The years [REDACTED], [REDACTED] and [REDACTED] remain open for this purpose because petitioner filed protective claims. The years [REDACTED] and [REDACTED] are closed.

DISCUSSION

As discussed in your memorandum, petitioner will meet the requirements of the mitigation statutes, once there is a "determination" with respect to [REDACTED]. Once the decision in the instant case becomes final it will constitute a "determination" within the meaning of I.R.C. § 1313(a). As of the date of the determination there will exist an "error", correction of which is barred by the statute of limitations. I.R.C. § 1311(a). This "error" constitutes one of the requisite circumstances of adjustment, a double disallowance of a deduction. I.R.C. § 1312(4). Further, the requirement of § 1311(b)(2)(B) is met because correction of the error was not barred at the time of the erroneous action. Thus, once the Tax Court's decision is final, petitioner may use the mitigation provisions to reopen [REDACTED] and [REDACTED] via a claim for refund.

As to equitable recoupment, we agree with the conclusion reached in your memorandum: that it is not available to petitioner as a remedy. Because the Tax Court has long held that it does not have jurisdiction to consider equitable recoupment, the petitioner may not use it as a basis to claim an offset in the instant case. See, e.g., Estate of Schneider v. Commissioner, 93 T.C. 568 (1989). Nor may the petitioner use equitable recoupment as the basis for a separate cause of action. United States v. Dalm, ___ U.S. ___, 110 S.Ct. 1361 (1990). Further, it is well settled that the mitigation statutes preempt equitable recoupment. See, e.g., Gooding v. United States, 326 F.2d 988 (Ct. Cl. 1963). Thus, where mitigation applies, the courts will not allow equitable recoupment.

Accordingly, we agree with the conclusions reached in your memorandum. Mitigation is available to the petitioner to reopen [REDACTED] and [REDACTED], but equitable recoupment is not. Please contact George Bowden at FTS 566-3407, if further information is required.


SARA M. COE